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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

E. J. LAVALLEE, Superintendent,
Petitioner,

against

UNITED STATES ex rel. EUGENE FITZGERALD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONSE NOT PRINTED

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STATUTE

New York Penal Law § 1751 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

E. J. LAVALLEE, Superintendent,

Petitioner,

against

UNITED STATES ex rel. EUGENE FITZGERALD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, the Superintendent of Clinton Correctional Facility, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, dated May 23, 1972 affirming the judgment of the United States District Court for the Eastern District of New York, which granted petitioner's application for a writ of habeas corpus.

Opinions Below

The opinion of the United States District Court for the Eastern District of New York, which was made orally by the District Judge on November 19, 1971, is not officially reported and is set forth in Appendix "A" pp. 44-49.

The opinion of the United States Court of Appeals fo the Second Circuit, dated May 23, 1972 is not yet official reported, and is set forth in Appendix "C".

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C § 1254(1).

Questions Presented

1. What is the standard of proof required of a defend ant who was free on bail at the time of his plea, who wa an admitted addict, having taken substantial amounts o heroin for 8 months prior to his plea, who was represente by competent counsel, and who twenty years later seeks t invalidate his conviction on grounds of narcotic intoxica tion?

2. What constitutes "clearly erroneous" findings on th part of a District Court judge in setting aside a state con viction where the reviewing court states it has difficulty understanding how the District Court reached its conclu sion, and further states that it is "doubtful" that "any other judge would under all the circumstances have ex tended much, if any, credibility or weight to it, or reached the same result"?

Statement of the Case

Respondent was convicted on January 15, 1953 in Supreme Court, Kings County (MARASCO, J.) of the crime of attempted violation of Section 1751 of the former New York Penal Law relating to the possession of heroin. Re-

spondent was convicted on his plea of guilty and was sentenced to Elmira Reformatory, Elmira, New York.*

1. ***The Plea***

On December 17, 1952 respondent appeared in Kings County Court with his co-defendant, Jack Mongiove, before Judge Carmine J. Marasco. Respondent was represented at the time by Solon B. Hauft, Esq.** and the Assistant District Attorney was Albert V. DeMeo, Esq. The attorneys for both defendants offered to withdraw their prior pleas of not guilty and to plead guilty to attempted violation of Section 1751 of the former Penal Law. Thereafter the following occurred:

"By the Court:

Q. Eugene Fitzgerald, is that your name? A. Yes.

Q. Jack Mongiove, is that your name? A. Yes.

Q. Your respective lawyers requested that I now permit both of you to withdraw your former pleas of not guilty and that I allow you to plead guilty to attempted violation of Section 1751 of the Penal Law as a felony, based on the second count in the indictment and the pleas to cover all counts in the indictment. Now, do you wish to plead guilty to the attempt to violate Section 1751 of the Penal Law as a felony? A. (Both defendants) Yes.

Q. In other words, if you plead guilty to the attempt you had in your possession a preparation or compound or mixture containing one per cent or more of an alkaloid of heroin, the aggregate weight of one-quarter of

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* Respondent served his time on this conviction, however, the conviction is now a predicate for a two and half year to seven year sentence on a conviction in Nassau County Court (Spitzer, J.) on February 19, 1969 for the crime of grand larceny in the second degree.

** Jack Mongiove was represented by Eugene Pelcyger, Esq.

an ounce or more. Is that what you plead guilty to? A. (Both defendants) Yes.

Q. Before you plead guilty, I want you to understand that I am not making any promise to you regarding the sentence you may receive in this case. Did your lawyers or the District Attorney or anyone else guarantee you any particular sentence if you plead guilty? A. (Both defendants) No.

Q. Are you pleading guilty of your own free will? A. (Both defendants) Yes.

Q. Did anybody force you to plead guilty? A. (Both defendants) No.

The Court: Take the plea." (Plea Minutes, Appendix "D" pp. 36, 37).

Following this there was some colloquy with respect to both defendants being users and having voluntarily committed themselves to Riverside Hospital for treatment as users (17). The attorneys asked that the defendants be committed to a hospital for treatment, but the Court pointed out that since they were not mental patients they could not be sent to a hospital (4-5). The Court did, however, direct that upon their return to jail they be immediately examined to determine what treatment was needed (5).

2. *The Coram Nobis Proceeding*

On January 26 and 27, 1970 a hearing was held in Supreme Court, Kings County (GITTLESON, J.), on the validity of the 1952 plea. Respondent, and his attorney at the time of the plea, testified. At the conclusion of the hearing the court found that

"• • • Petitioner did, in reality, authorize Mr. Hanft to enter the plea that was entered as it appears from a transcript of the minutes taken at the time that the plea was accepted by the Court." (Coram Nobis minutes, p. 39).

The court also found that respondent was not advised of his right to appeal and so vacated the sentence only for the purpose of giving respondent an opportunity to appeal the conviction (Coram Nobis Minutes, p. 40).* In addition, the court stated that,

> "In making my holding, I hold that the plea as entered under the circumstances, disclosed by the minutes, was of such a nature that in reality he did take the plea, and he did authorize the proffering of the plea that was accepted and that it was taken in good faith. And Mr. Hanft, in accordance with the instructions and authority proposed same by this defendant, did offer the plea in the defendant's presence and with his consent. And the plea stands, and the plea was properly entered. And in the Court's opinion it was valid." (Coram Nobis minutes, p. 41).

On January 23, 1970 respondent made an application for a writ of habeas corpus in Supreme Court, Kings County which was denied on February 5, 1970 without a hearing. Appeal of the denial of the writ as well as Judge Gittleson's decision was affirmed by the Appellate Division, Second Department, without opinion on April 12, 1971 (36 A.D. 2d 904). Leave to appeal was denied without opinion by the Court of Appeals on June 8, 1971.

3. *The District Court Proceedings*

Pursuant to a decision and order of the United States District Court for the Eastern District of New York (WEINSTEIN, J.), a hearing was held on November 19, 1971 on the validity of the 1952 plea. The District Judge directed such hearing despite the fact that State Court Judge Gittleson had decided the issue against Fitzgerald. At the hearing before Judge Weinstein, Fitzgerald simply re-

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* Respondent was resentenced on January 27, 1970 to Elmira Reformatory *nunc pro tunc* as of January 15, 1953.

peated his bare contention of being under the influence of drugs; and it was clearly solely upon this testimony so repeated that the District Judge sustained the writ.

Eugene Fitzgerald testified that on December 17, 1952 he was out on bail on a narcotics charge (H 4).* He stated that when he got up he prepared his "heroin fix." He said that his co-defendant came by and that they left with the witness' mother to meet his co-defendant's parents before going to Court, and that both he and his co-defendant were under the influence of narcotics (H 4).

Respondent stated that he appeared on the 17th of December, 1952 before Judge Marasco and that at the time he was 20 years old (H 5-6). He said that after pleading guilty bail was revoked and he was sent to Raymond Street Jail where he was on the "flats" for "cold turkey" withdrawal (H 7). He remained at Raymond Street until he was sentenced on January 15, 1953 (H 7).

On cross-examination the witness said that he had been taking drugs for eight to ten months prior to his pleading in December 1952 (H 9). He said that he had committed himself to Riverside Hospital in July of 1952 for a week or ten days (H 9). The witness stated that he took approximately half a level teaspoon of heroin, which he purchased on the street, about five or six times a day if he had it (H 9-10).

The respondent testified that on the day of the plea he took his heroin fix at about 9 or 9:15 in the morning and that the pleading occurred about noon (H 10). He said that at the time he believed that he was pleading to go to the hospital, but that he didn't know and hadn't been advised that he was pleading to a felony and that he was waiving his right to a trial (H 11).

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* "H" refers to the transcript of the District Court hearing.

Respondent stated that he first met his attorney at his arraignment and that a plea was entered without any conversation with his attorney (H 12-13). Subsequently, although the respondent knew he was charged with a felony, the only conversation with his attorney concerned his getting into a hospital (H 13-14).

Respondent stated that at the time of his plea he was before the court with his mother and his attorney, and his co-defendant with his parents and his attorney, and that everyone was talking at once (H 15). He said he had been told what was going to be done and he was satisfied with that, but that he wasn't satisfied with the outcome (H 16).

The witness said that prior to his plea in 1952 he had been in court on petty larceny charges in 1948 and 1950 and that he went to night court a few times for playing dice (H 17-18). He said that to a certain degree he was familiar with what went on in court (H 19). He said the difference between what he understands today and what he understood in 1952 was that he now knew a little about legal procedure, but he didn't know anything about legal procedure twenty years ago (H 20).

Respondent stated that he didn't remember answering the Clerk's question regarding his pedigree (H 21). He said that according to the Assistant District Attorney's record in Nassau County he had been arrested 23 times and convicted eighteen times (H 23).

Solon B. Hanft, Esq. testified that he had been practicing law for 44 years and that in 1952 his practice was primarily criminal law (H 24). He said that he did not recognize respondent nor have any records of the case (H 24).

The witness said that his procedure in 1952 was to consult with his client before pleading (H 24). He said that he never plead a client who he felt couldn't properly comprehend the proceedings or where there was any indica-

tion that he was under the influence of drugs (H 24-25). He said he was familiar with Judge Marasco's practice at pleading and that in the witness' presence he never took a plea from a man who did not comprehend the proceedings (H 25).

On cross-examination the witness said that he had represented many narcotics addicts (H 26). He stated:

> "I believe that my experience qualifies me to state whether or not the individual whom I am representing understands what I am saying.
>
> "Now, whether he is under the influence of narcotics or some other type of drugs, I don't think I am qualified to say." (H 26).

JOHN MONGIOVE testified that he was respondent's co-defendant in 1952 (H 27). He said that on the morning of the plea, December 17, 1952, both he and respondent took a "fix" of heroin. He said that they "were so shook up about appearing in court that we took more than one" fix (H 28). On cross-examination he said he didn't remember answering the Clerk's questions after he took the plea (H 31).

ALBERT V. DEMEO, ESQ. testified that he was an Assistant District Attorney from 1946 to 1969 (H 35). He stated he did not recognize the respondent and did not have any independent recollection of the pleading (H 35). He said that he had appeared at pleas where the defendant was not able to comprehend the proceeding and that a plea was not taken in such a situation (H 36). He also stated that in his presence a plea was never taken from somebody under the influence of narcotics (H 36).

The witness stated that following a plea of guilty certain questions with respect to pedigree would be asked the defendant by a Clerk and be recorded on the original indictment (H 36-37).

In response to his familiarity with narcotics addicts, the witness said:

> "[I] believe that I would generally speaking be able to recognize a man who is so intoxicated by reason of drugs that I would certainly not recommend any plea be taken from him." (H 37)

The witness said that he knew Mr. Hanft and Mr. Pelcyger (Mongiove's attorney) well, and that they were able men experienced in criminal law (H 38). He said that the process of working out a plea was done in advance by the defendant's attorney and the Assistant District Attorney (H 38). He said that after the offer to change the plea to guilty was made to the court, the court would proceed to interrogate the defendant in order to determine whether that was his plea and whether he was voluntarily, knowingly and intelligently offering the plea (H 38).

At the conclusion of the hearing the court stated that:

> "Based upon the written records and the testimony, there can be no doubt in my mind that this petitioner was under the *influence of heroin* at the time of the plea." (Appendix "A" p. 21; emphasis added)

The court then went on to discuss the references to drug use that were contained in the plea minutes and in the sentence minutes (Appendix "A" pp. 21, 22).

The court thereafter stated that while both respondent's former attorney and the Assistant District Attorney who testified were honorable men, their testimony as to the question of drug use did not "convince" the Court.

> "I don't think it would convince anybody. You cannot simply tell with young men of this kind, who are in generally good physical condition, and who are known to be general users, whether they are under the influence of narcotics. You cannot tell that visually, un-

fortunately. It can only be determined by physical tests, * * *" (Appendix "A" p. 23)

The court followed this by stating:

"[I] find that they were under *substantial heroin influence,* that they were intoxicated, and that they did not realize the significance of what was going on at the time of the plea." (Appendix "A" p. 23, emphasis added)

After some colloquy between counsel and the court, the court, in reply to a query by the Assistant Attorney General as to whether the finding that the plea was invalid was based solely on the fact that appellee was under the influence of narcotics, stated:

"I am finding that he was under a very *substantial influence of narcotics, having taken a larger than usual dose,* and that *he did not appreciate and understand the nature of the plea* that was being taken from him. He understood the words, I am sure, but *he had no judgment at the time sufficient to make the plea a voluntary one.*" (Appendix "A" p. 24, emphasis added)*

4. *The Decision of the Court of Appeals*

In a decision dated May 23, 1972 the Court of Appeals for the Second Circuit affirmed the judgment of the District Court. After reviewing the facts and evidence the court stated:

"Upon the foregoing record the evidence appears to us to weigh heavily against Fitzgerald's application

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* By order dated November 30, 1971 (Appendix "B") the District Court directed that if respondent was not re-arraigned within 30 days for pleading the conviction would be voided; and that within 30 days thereafter respondent was to be re-sentenced on his 1969 conviction. The order also contained a stay pending a determination of the appeal.

and we frankly state that we have difficulty in fathoming the process of appraisal that persuaded the able district judge to reach the opposite conclusion, particularly when the burden of proof was on petitioner rather than on respondent. *United States ex rel. Schuster* v. *Herold*, 410 F. 2d 1071, 1085 (2d Cir.), *cert. denied*, 396 U.S. 847 (1969); *Papalia* v. *United States*, 333 F. 2d 620, 621 (2d Cir.), *cert. denied*, 379 U.S. 838 (1964); *United States* v. *Tom, supra.* However, there was evidence to support the finding of involuntariness, namely Fitzgerald's testimony 20 years after the event that he did not understand what he was doing, which cannot be dismissed as insubstantial. Since the credibility of Fitzgerald's testimony and the weight to be extended to it were matters to be determined by the trial judge, who observed the witnesses, we cannot say that the court's findings were clearly erroneous, doubtful as we may be as to whether any other judge would under all of the circumstances have extended much, if any, credibility or weight to it, or reached the same result." (Appendix "C" p. 33).*

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* By order dated June 16, 1972 the Court of Appeals granted petitioner's motion to stay the issuance of the mandate pending application to this Court for a writ of certiorari pursuant to Rule 41(b) F.R.A.P.

REASONS WHY CERTIORARI SHOULD BE GRANTED

The decision of the District Court presents a serious issue regarding the challenge of a guilty plea on grounds of narcotic intoxication by a defendant free on bail at the time of his plea. The decision of the Court of Appeals in reviewing this decision presents an equally serious issue as to what constitutes "clearly erroneous" as set forth in *United States* v. *Gypsum Co.*, 333 U.S. 364, 395 (1948), rehearing denied, 333 U.S. 869.

The relevant issue before the District Court was whether or not the plea was voluntary, *Boykin* v. *Alabama*, 395 U.S. 238 (1969); *Machibroda* v. *United States*, 368 U.S. 487 (1962); *Kercheval* v. *United States*, 274 U.S. 220 (1927), and represented an intelligent choice among the alternative courses of action open to him. *North Carolina* v. *Alford*, 400 U.S. 25 (1970).

It is beyond question—as the Court of Appeals itself explicitly recognized—that respondent had the burden of proof in establishing his contention that he was so incapacitated by his use of drugs that his plea was invalid. *United States* v. *Tom*, 340 F. 2d 127, 128 (2d Cir. 1965) mot. for lv. to file petition for writ of habeas corpus denied 382 U.S. 912; *Holmes* v. *United States*, 323 F. 2d 430, 431 (7th Cir. 1963) *cert. denied* 376 U.S. 933 (1964); *Johnston* v. *United States*, 292 F. 2d 51, 53 (10th Cir. 1961); *Wood* v. *United States*, 251 F. Supp. 310 (W.D. Vir. 1968). Furthermore, respondent had a heavy factual burden, *Cruz Rivera* v. *United States*, 341 F. 2d 746, 747 (1st Cir. 1965), and was required to prove his contention by a preponderance of the evidence, *Crail* v. *United States*, 430 F. 2d 459 (10th Cir. 1970); *Grennett* v. *United States*, 403 F. 2d 928, 930 (D.C. Cir. 1968).

The test for competency has been set forth by this Court in *Dusky* v. *United States,* 362 U.S. 402 (1960), as being whether the defendant

> "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceeding against him."

1. ***Respondent's Case***

Taken in the best possible light to respondent, the evidence (by respondent's self-serving testimony) at the hearing was to the effect that he was a drug user for 8 to 10 months preceding his plea (H 9), that he took heroin 5 or 6 times a day (H 10) and that the morning of his plea he took a "half sixteenth" of heroin (H 10); also, that he thought he was pleading to go to the hospital, not that he was pleading to a felony and waiving his rights (H 11).

Even accepting *arguendo* this last incredible assertion, there is, however, no evidence to support the Court's finding that respondent, an admitted addict who was accustomed to taking heroin 5 or 6 times a day, was under *substantial heroin influence.* There was no medical testimony offered at all to support such conclusion which was based simply upon respondent's belated blatant assertion. In *Holmes* v. *United States, supra,* a case very similar to the one at bar in which there was evidence that respondent, a drug addict, "was taking shots of heroin and morphine three times a day and that he had injected one-sixteenth of an ounce* of these drugs into his body approximately one and one-half hours prior to his appearance in court on the day he entered his plea of guilty", the court held respondent failed to meet his burden of proof.

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* Twice the amount as respondent here testified to taking.

Nor is there supporting evidence for the court's finding that respondent did not appreciate and understand the nature of the plea or have sufficient judgment to make the plea a voluntary one. Respondent took the position before the District Court that being under the influence of drugs was sufficient without more to invalidate his plea. A reading of the District Court's finding leads only to the conclusion that the court accepted this position, which, to say the least, is contrary to law. For instance the District Court stated:

> "It is unfortunate, I think to reopen these cases so long after the event. I do not see what else we can do about it. I realize this is a great problem. I have it all the time in sentencing myself. I try to cover it as much as I can by asking the defendant if he understands, if he is under the influence of narcotics, or if he has taken narcotics at any time, and then I check with the lawyer who consulted with him and with others in the Court that dealt with him. There is really no full protection against it." (Appendix "A" p. 23)

The position of the District Court is clearly untenable. The law is well established that the use of drugs does not *per se* render a defendant incompetent. *Grennett* v. *United States, supra,* at p. 931; *White* v. *United States,* 367 F. 2d 788, 790 (8th Cir. 1966); *Holmes* v. *United States, supra,* at p. 431; *Deese* v. *United States,* 303 F. Supp. 619 (D.C. Car. 1969); *Wood* v. *United States, supra,* at p. 310; *Davis* v. *United States,* 392 F. 2d 291, 292 (10th Cir. 1968).

In considering the question of competency, the courts have recognized medical evidence that the use of drugs by an addict who is accustomed to taking drugs and has developed a tolerance (*Hansford* v. *United States,* 365 F. 2d 430 [7th Cir. 1963] *cert. denied* 376 U.S. 933 [1964]) may be such as to have little or no effect on his understanding of

the proceedings.* *Davis* v. *United States, supra; Holmes* v. *United States, supra.*

Respondent's contention that he didn't understand what was going on is belied by the fact that (1) he was not a newcomer to court proceedings, having been in court on criminal charges on at least three other occasions before the instant plea (H 17-18); (2) that he remembered who was in court during the pleading and exactly where they were standing (H 15; Coram Nobis Minutes, p. 33); (3) that he had no problem hearing what was being said (H 15); (4) that he responded to the court's interrogation at the time of the plea (Appendix "D" pp. 36, 37); (5) that he was able to comprehend and answer the questions regarding his pedigree (H 21-22; Appendix "E") and (6) that he himself admitted that his only difference in understanding at the hearing and his earlier plea was that "I know a little about legal procedure, when I knew nothing about legal procedure twenty years ago" (H 20).

Finally, respondent's contention that he thought he would go to a hospital does not rise to constitutional proportions. The court below has itself indicated a rejection of any "subjective" belief of defendant, *United States ex rel. LaFay* v. *Fritz,* 455 F. 2d 297 (2d Cir. 1972), and

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* In *Wood* v. *United States,* 251 F. Supp. 310, 313 (W.D. Vir. 1966), where the defendant claimed incompetency by virtue of his use of drugs during trial, a government witness testified that the defendant

> "needed a larger amount of drugs on the days of his trial due to his increased anxiety and fear. A drug addict can tolerate more than his usual amount of narcotics if his dependence is greater on a particular occasion ,and dependence increases with anxiety and fear."

In *Sewell* v. *Lainson,* 57 N.W. 2d 556, 559 (Sup. Ct. Iowa 1953), the court stated:

> "We also take judicial notice, however, that one who is an opium addict is nerve-wracked and ill when denied the drug, and approaches normalcy only when he has access to it."

even if respondent had received erroneous advice from his attorney, his claim would not be valid. *Parker* v. *North Carolina*, 397 U.S. 790, 797 (1970); *United States ex rel. Scott* v. *Mancusi*, 429 F. 2d 104, 107-108 (2d Cir. 1970) *cert. denied* 402 U.S. 909 (1971).

2. *Petitioner's Case*

Respondent's former attorney testified that he never pleaded a client who he felt couldn't properly comprehend the proceedings or who gave any indication of being under the influence of drugs (H 24-25). He said that he had represented narcotics addicts many times and that while he wasn't qualified to say whether an individual was under the influence of drugs, *he was qualified to state whether or not the individual he represented understood what he was saying* (H 26).

The former Assistant District Attorney at the proceeding testified that he had never seen a plea taken from a defendant who was not able to comprehend the proceeding or who was under the influence of narcotics (H 36). He said that he would "generally speaking be able to recognize a man who is so intoxicated by reason of the effect of drugs" that he would not recommend that a plea be taken (H 37).

Although the District Court could properly determine the weight to be given to the testimony of petitioner's witnesses, it is submitted that error was committed when not even *minimal* consideration was given to their testimony. It is simply incredible to believe that no one would notice anything unusual about a person who was under "substantial heroin influence" was "intoxicated" and "didn't know what was going on". The cases are replete with holdings that consideration should be given to counsel's observation of the defendant. *United States* v. *Tom*, *supra*, at p. 128; *Holmes* v. *United States*, *supra*, at p. 431;

Cruz Rivera v. *United States, supra,* at p. 747; *Deese* v. *United States, supra,* at p. 623.

Most importantly there was no evidence to contradict the testimony that both respondent and his co-defendant were represented by able and experienced counsel (H 38). In the absence of any finding of inadequacy of counsel the District Court's finding of an invalid plea flies in the face of this Court's decision in *McMann* v. *Richardson,* 397 U.S. 759 (1970).

Finally, there was no evidence to contradict the testimony that the Judge accepting the plea would not have done so from a defendant who appeared not to comprehend the proceeding or to be under the influence of narcotics (H 25, 38). Surely, some weight must be given to the regularity of the proceeding and the competency of the Judge. *Deese* v. *United States, supra,* at p. 624; *United States* v. *Bostic,* 206 F. Supp. 855, 858 (D.C.D.C. 1962) *aff'd.* 317 F. 2d 143.

The evidence is overwhelming that respondent did not sustain his burden of proof and that the District Court misconstrued the law with respect to competency. Since a large number of defendants on bail are addicts, the standard applied by the District Court could lead to a wholesale invalidating of pleas if it were to remain the measure to be applied.

3. *The Review of the District Court's Decision by the Court of Appeals*

The Court of Appeals reviewed all of the evidence before the District Judge and concluded that they had difficulty in fathoming the process of his appraisal. The court continued, however, that the evidence in support of respondent's claim, namely, his own "testimony 20 years after the event", was not insubstatial and that since his credibility was for the Judge, they could not say that his

finding was clearly erroneous—this, despite the fact that they doubted "any other judge would under all of the circumstances have extended much if any credibility or wegiht to it, or reached the same result."

We submit that the Court of Appeals in failing to reverse the lower court was wrong on two counts. First of all, the Court of Appeals was wrong in holding that the testimony of an obviously interested witness, standing alone on the critical issue of his state of mind at the plea was *substantial* (aside from the fact that he had the burden of proof and that there was contradictory evidence). Secondly, the Court of Appeals misconstrued the measure of what is "clearly erroneous". A better example of this than the doubts expressed by the Court of Appeals in its decision would be difficult to find.

This Court has said that "although there is evidence to support it" a finding is "clearly erroneous" when

> "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Gypsum Co.*, 333 U.S. 364, 395 (1948) rehearing denied 333 U.S. 869.

We submit the Court of Appeals might at the very least have looked to this Court's language in *Commissioner* v. *Duberstein*, 363 U.S. 278, 292 (1960) on the measure of "clearly erroneous", that

> "• • • there comes a point where findings become so sparse and conclusory as to give no revelation of what the District Courts concept of the determining facts and *legal standards may be.*" (emphasis added)

CONCLUSION

For the reasons given above, a writ of certiorari should issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
June 27, 1972

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioner

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

IRVING GALT
JOHN G. PROUDFIT
Assistants Attorney General
of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF NEW YORK.

71-C-782

UNITED STATES OF AMERICA, ex rel. EUGENE FITZGERALD,
Petitioner,

against

HON. J. EDWIN LaVALLEE, superintendent,
Respondent.

United States Court House
Brooklyn, New York

November 19, 1971
11:00 A.M.

Before: HON. JACK B. WEINSTEIN, U. S. D. J.

HENRY R. SHAPIRO,
Court Reporter.

The Court: All right. I will give you my findings. Based upon the written records and the testimony, there can be no doubt in my mind that this petitioner was under the influence of heroin at the time of the plea. It is quite clear from what the court said that that is true.

On pages 5 and 6 of the minutes of December 17, 1952, the Court said, among other things, after being informed that this was a heroin case and that they were found with heroin in their possession and after a request from the attorneys that they be committed to a hospital, namely, the Riverside Hospital, which was the hospital then available only for narcotics addicts, and had no other function, the Court said, "It could not commit them to Kings County because this was not a mental situation, in the pure sense." He did recognize, saying "This is something different. I can and will order these defendants to be so confined so that they will receive such treatment as they need because of their present, and I underscore present condition, but I can't send them to the hospital."

It is my recollection, but you could correct me if I am wrong, that at this early stage in our dealings with hereoin, the courts did not have the power under these circumstances to send a defendant for medical treatment only.

The court then went on to say, and I quote, "The Court orders that both defendants receive such medical treatment as they may be found to be in need of."

In the context it is clear he was talking about treatment for their heroin addiction. The Court then went on and said, "I am doing indirectly what you request me to do," implying I think treatment for the heroin.

Then the Court said, "I know what you are getting at. We would need fifty or more hospitals just for that," referring to the heroin problem, because there is reference to Riverside Hospital immediately thereafter.

Appendix A

At the top of page 6 the Court says that they need help. That can only mean help for addiction.

Then the Court went on to say, "They not only ruin themselves, but their family." Speaking of Mongiode, the Court said, "He's a coke fiend." Then the Court went on and said, "It's a terrible thing if they get into the habit and they need the stuff, they will kill somebody. I handled a lot of these narcotics cases. I have more contempt for the peddler. I know these cases." Then the Court after colloquy said, "Where a man becomes a user, he needs our sympathy. Only God can help him. He is clearly referring to these men. The minutes of January 15th refer repeatedly to hospitalization and the request of the parents that these boys be put in the hospital. The court takes judicial notice of the fact that cold turkey treatment in the city jails was common in that period. On page 4 there is reference to drug addiction. I do not think there can be any doubt—not the slightest doubt, in view of the testimony here, that we had two young men that were users, although there is no written corroboration of the fact that they took a substantial dose of heroin before they went to trial. I do not think there is such doubt that what they are telling us is not the truth. I believe both witnesses were credible on this point. I do not think any judge would find differently. The statement of the two lawyers—they are honorable men—simply doesn't convince me on this point. I don't think it could convince anybody. You cannot simply tell with young men of this kind, who are in generally good physical condition and who are known to be general users, whether they are under the influence of narcotics. You cannot tell that visually, unfortunately. It can only be determined by physical tests, so I find that they were under substantial heroin influence, that they were intoxicated, and that they did not realize the significance of what was going on at the time of the plea. I do not see how you can arrive at any other conclusion.

It is unfortunate, I think, to reopen these cases so long after the event. I do not see what else we can do about it. I realize this is a great problem. I have it all the time in sentencing myself. I try to cover it as much as I can by asking the defendant if he understands, if he is under the influence of narcotics, or if he has taken narcotics at any time, and then I check with the lawyer who consulted with him and with others in the court that dealt with him. There is really no full protection against it.

With a history of this kind of these boys, I do not see how you could say that they understood what was going on with the pressure of parents at that time. These were two Italian-Catholic families. You know what the situation was then, drugs were just beginning to be used. They were moving out from the Black and Puerto Rican communities. This was a great disgrace at that time among these Italian families. The pressures were such that the kids weren't asked what they wanted to do.

What would be the effect of my granting the writ here, you would go back for re-sentence.

Mr. Proudfit: It would have to go back for a re-pleading, I imagine.

Mr. Fier: That's right.

The Court: The evidence is long since gone. It would have to go back for re-sentence on the second felony. What is the conviction under which he is now serving?

Mr. Fier: Grand larceny, two-and-a-half to seven.

The Court: Is that what he got?

Mr. Fier: Yes.

The Court: What would he get as a first offender?

The Defendant: Two-and-a-half to five.

The Court: Maximum. That is probably what will happen. It is not going to make very much difference. It may well be, as some people say, all of this is not very useful, but I think the law as it stands makes this decision imperative. It do not believe I have any alternative.

Mr. Proudfit: Your Honor is not finding that the plea was invalid, solely on the basis this man was under the influence of narcotics; is that correct?

The Court: I am finding that he was under a very substantial influence of narcotics, having taken a larger than usual dose, and that he did not appreciate and understand the nature of the plea that was being taken from him. He understood the words, I am sure, but he had no judgment at that time sufficient to make the plea a voluntary one. That is my finding of fact. Is there any other findings or statements any of you wish me to make?

Mr. Fier: If it is possible—possibly not relevant to the proceeding before your Honor.

APPENDIX B.

Order Sustaining Writ of Habeas Corpus.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71 C 782

UNITED STATES OF AMERICA ex rel. EUGENE FITZGERALD,

Petitioner,

against

E. J. LAVALLEE, Superintendent,

Respondent.

Petitioner having on June 25, 1971 filed a writ of habeas corpus attacking a judgment of conviction rendered in County Court, Kings County on January 15, 1963 (Ind. No. 1987/1952) and this Court having directed a further return by respondent by Order to Show Cause dated August 11, 1971, following the receipt of petitioner's letter dated August 3, 1971 and in which Order to Show Cause, the Court noted that in its order of July 28, 1971, it had found the affidavit of Assistant Attorney General Ilene J. Slater, sworn to July 20, 1971, filed in response to be insufficient, and a supplemental affidavit by Assistant Attorney General Ilene J. Slater, sworn to September 16, 1971, having been filed and this Court having by Order dated October 20, 1971 appointed Charles H. Fier, Esq. as attorney for petitioner and the matter having come on before this Court for a hearing on November 19, 1971 and the Court at the conclusion of this hearing having rendered its finding of fact and opinion, it is

ORDERED that the writ is granted and that the judgment of conviction of petitioner in County Court, Kings County (Ind. No. 1987/1952) for the crime of attempted violation of Section 1751 of the former Penal Law, be and the same is hereby set aside and declared of no lawful force and effect unless the State of New York shall determine to re-arraign petitioner for repleading within 30 days and it is further

ORDERED that if the petitioner is not re-arraigned on the 1953 conviction that within 30 days after the above voiding of that conviction, he shall be resentenced in County Court, Nassau County on his conviction for grand larceny rendered on February 19, 1969 without reliance upon the 1953 conviction and it is further

ORDERED that the foregoing provisions shall be stayed pending the prompt perfection of an appeal by respondent and the determination of such appeal by the Court of Appeals.

Dated: New York, New York, November 30, 1971.

JACK B. WEINSTEIN
USDJ

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 681—September Term, 1971.

(Argued May 5, 1972 Decided May 23, 1972.)

Docket No. 72-1085

UNITED STATES ex rel. EUGENE FITZGERALD,

Petitioner-Appellee,

—against—

E. J. LAVALLEE, Superintendent.

Respondent-Appellant.

Before:

KAUFMAN, ANDERSON and MANSFIELD,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *Judge,* granting a writ of habeas corpus on the ground that the applicant did not understand the consequences of his guilty plea because of the influence of narcotics.

Affirmed.

JOHN G. PROUDFIT, Assistant Attorney General (Louis J. Lefkowitz, Attorney General of the State of New York, Samuel A. Hirsho-

witz, First Assistant Attorney General, of Counsel), *for Respondent-Appellant.*

CHARLES H. FIER, Brooklyn, N.Y., *for Petitioner-Appellee.*

MANSFIELD, *Circuit Judge:*

Following an evidentiary hearing the district court granted the application of petitioner, a state prisoner, for a writ of habeas corpus on the ground that his 20-year old plea of guilty to an indictment in the Supreme Court, Kings County, charging him with attempted violation of § 1751 of the former Penal Law (relating to possession of heroin) was involuntary. Judge Weinstein found that at the time of the plea Fitzgerald was under the influence of heroin and did not appreciate or understand the significance of his action. Petitioner has long since served the sentence imposed pursuant to his 1952 plea. Unless vacated, however, the writ will have the effect of reducing a later sentence, which Fitzgerald is now serving, imposed upon him in 1969 as a second offender after he had been convicted of grand larceny. We affirm.

There was ample evidence before Judge Weinstein, including the testimony of petitioner and a co-defendant, John Mongiode, to the effect that at the time of his 1952 guilty plea petitioner was a heroin addict who had, three hours before he pleaded guilty, taken a "fix" of approximately one-half a level teaspoon of heroin, a dose which he usually took five or six times a day if he had the heroin. However, such use of narcotics does not *per se* render a defendant incompetent to plead. *United States* v. *Tom,* 340 F.2d 127 (2d Cir.), *motion for leave to file petition for writ of habeas corpus denied,* 382 U.S. 912 (1965); *Grennett* v. *United States,* 403 F.2d 928, 931 (D.C. Cir. 1968);

White v. *United States,* 367 F.2d 788, 790 (8th Cir. 1966); *Holmes* v. *United States,* 323 F.2d 430, 431 (7th Cir. 1963), *cert. denied,* 376 U.S. 933 (1964). Indeed, a heavy heroin user might be more competent to appreciate the nature and consequences of his plea after taking his usual dose than if he had not taken it, particularly if failure to satisfy his habit had led to withdrawal symptoms. See, e.g., *Wood* v. *United States,* 251 F. Supp. 310, 313 (W.D. Va. 1966); *Sewell* v. *Lainson,* 244 Iowa 555, 562, 57 N.W.2d 556, 559 (1953). While use of heroin is a relevant factor, the test continues to be whether the defendant has the ability to consult with counsel and a rational understanding of the proceedings against him. *Dusky* v. *United States,* 362 U.S. 402 (1960); *United States* v. *Sullivan,* 406 F.2d 180, 185 (2d Cir. 1969).

The principal issue before Judge Weinstein, therefore, was whether Fitzgerald had satisfied his burden of proving that he did not at the time realize the significance of his guilty plea. As might have been expected in this effort to resurrect his state of mind at a time 20 years earlier, the sole evidence offered by Fitzgerald on the issue was his own testimony. He testified that while he knew at the time of the 1952 plea that he was charged with a felony, he understood that he "was pleading to go to a hospital" and that he did not realize that he "was pleading guilty to a felony or waiving my right to trial or have witnesses brought forth. I wasn't advised of any of that." Following the guilty plea and the taking of his personal history or "pedigree" by the court clerk, he was remanded not to a hospital but to the Raymond Street jail where he suffered withdrawal.

On January 15, 1953, petitioner was sentenced by the state court, but did not raise any question as to his earlier plea at that time or at any time during the 58 months served by him. His testimony before Judge Weinstein on

this issue was that when he was sentenced he did "not really" know what was going on because he "didn't sleep for a period of a month" following his guilty plea.

Respondent sought to disprove the foregoing by impeachment of Fitzgerald's credibility and by testimony of petitioner and others indicating that he understood the nature and consequences of his guilty plea. At the time of the plea he was 20 years old and had attended school through the eighth grade. The record of the 1952 plea discloses that while the state judge (Justice Carmine J. Marasco) did not engage in the detailed interrogation mandated by later Supreme Court decisions, he did ask several questions, to which Fitzgerald gave answers indicating his understanding of the nature of the charge and of the essential circumstances.

In addition to Fitzgerald's obviously strong motive to testify before Judge Weinstein in a way that would benefit himself, he had a record of 23 arrests and 18 misdemeanor convictions. Two of these convictions and a few other court appearances by him on other criminal charges had occurred prior to the 1952 plea, indicating that he had had at least some practical familiarity with state criminal procedure at the time when the guilty plea was taken. It was further established that immediately following petitioner's 1952 guilty plea he was asked a series of questions by the court clerk seeking information as to his personal history or "pedigree" (e.g., age, address, occupation, schooling, mental status, religion, parents, drug addiction, etc.) in response to which he furnished accurate answers.

Upon cross-examination Fitzgerald further testified that following the initial arraignment upon the 1952 charge and prior to his plea of guilty he had consulted with his court-assigned counsel, Solon B. Hanft, in the latter's office, where he gave Hanft the essential facts with respect to

the pending charge. Hanft advised him that he was charged with a felony since the quantity of heroin involved (118 grams) exceeded the limits of a misdemeanor charge (108 grams), but that Hanft felt that he "could get us a misdemeanor and get us into a hospital, so he said he will do what he can." However, aside from the fact that his attorney's mistaken belief would not provide a basis for relief, *United States ex rel. LaFay* v. *Fritz,* 455 F.2d 297 (2d Cir. 1972), the plea transcript reveals repeated references to the charge as a felony when the plea was taken and statements by the judge that although he realized that defendants (Fitzgerald and Mongiode) needed medical treatment for their addiction, he did not have the power to commit them to a hospital.

Respondent also called as witnesses Mr. Hanft and Albert V. DeMeo, the Assistant District Attorney who represented the state when petitioner's plea was taken. Hanft was a lawyer with wide experience in criminal trial practice who had appeared in numerous criminal cases and DeMeo had handled hundreds of prosecutions in the District Attorney's office. Quite understandably neither could recall Fitzgerald or his guilty plea. Hanft testified, however, that he would not have pleaded a client guilty without first being satisfied that his client knew the nature and consequences of his actions. DeMeo, now a Professor of Law, testified that from observation of drug addicts he felt capable of recognizing a man so intoxicated by reason of drugs as not to have the requisite understanding needed to plead, and that he never would have gone forward with a pleading under such circumstances.

Lastly, the district court had before it the fact that in a 1970 coram nobis proceeding before Justice Harry Gittleson of the Kings County Supreme Court, initiated by Fitzgerald in an effort to set aside his 1952 guilty plea, Fitzgerald had given similar testimony to the effect that

he was "under the influence of narcotics through the whole proceeding,"[1] and Hanft had testified to the procedure he had customarily followed in advising a client who was dissatisfied with the court's disposition of his case upon a plea of guilty. At this hearing Fitzgerald testified that he had served over 58 months in Elmira pursuant to the 1953 sentence and had been convicted 12 times after his release. However, he had not sought to set aside the 1952 plea or sentence until his initiation of the coram nobis proceeding in January, 1970. His belated institution of legal proceedings may have been attributed to his newly acquired knowledge of criminal procedure resulting from recent study of law books. Hanft testified that if Fitzgerald had at any time indicated dissatisfaction with his plea, he would have moved to withdraw it and if this motion were denied, he would have appealed.

Following the hearing Justice Gittleson on January 27, 1970, held that Fitzgerald had authorized Hanft to enter the guilty plea, that the plea was properly entered, and that the "claim now urged by the defendant is an afterthought," stating:

---

[1] "Q. And between the time the plea was taken and the sentence was imposed, did you have any funds to retain your own attorney?

A. No, can I say that I never took this plea? I never was advised that I waived a jury trial, as I was under the influence of narcotics through the whole proceeding and the record will show this.

* * * * *

Q. But you knew at that time, did you not, that the plea—you weren't actually taking that plea. Is that what you contend?

A. I contend I was under the influence of narcotics and didn't know what was going on. I was 20 year of age and was not advised of anything.

* * * * *

Q. But you knew that you were sentenced as a felony, didn't you?

A. I had no knowledge of anything. I was 20 years old and I didn't know what was going on."

(Minutes of coram nobis proceeding, Jan. 26, 27, 1970, Fitzgerald testimony at pp. 17, 22, 34.)

"In making my holding, I hold that the plea as entered under the circumstances, disclosed by the minutes, was of such a nature that in reality he did take the plea, and he did authorize the proffering of the plea that was accepted and that it was taken in good faith. And Mr. Hanft, in accordance with the instructions and authority proposed same by this defendant, did offer the plea in the defendant's presence and with his consent. And the plea stands, and the plea was properly entered. And in the Court's opinion it was valid."

Justice Gittleson, however, did not make a specific finding of voluntariness except to the extent that it is implicit in his finding of validity.

Upon the foregoing record the evidence appears to us to weigh heavily against Fitzgerald's application, and we frankly state that we have difficulty in fathoming the process of appraisal that persuaded the able district judge to reach the opposite conclusion, particularly when the burden of proof was on petitioner rather than on respondent. *United States ex rel. Schuster* v. *Herold,* 410 F.2d 1071, 1085 (2d Cir.), *cert. denied,* 396 U.S. 847 (1969); *Papalia* v. *United States,* 333 F.2d 620, 621 (2d Cir.), *cert. denied,* 379 U.S. 838 (1964); *United States* v. *Tom, supra.* However, there was evidence to support the finding of involuntariness, namely Fitzgerald's testimony 20 years after the event that he did not understand what he was doing, which cannot be dismissed as insubstantial. Since the credibility of Fitzgerald's testimony and the weight to be extended to it were matters to be determined by the trial judge, who observed the witnesses, we cannot say that the court's findings were clearly erroneous, doubtful as we may be as to whether any other judge would under all of the circumstances have extended much, if any, credibility or weight to it, or reached the same result. F.R.Civ.P. 52; *Zovluck* v.

United States, 448 F.2d 339, 341 (2d Cir. 1971); *United States ex rel. Carter* v. *LaVallee*, 441 F.2d 620, 622 (2d Cir. 1971); *United States ex rel. Jefferson* v. *Follette*, 438 F.2d 320, 332 (2d Cir. 1971).

The order is affirmed.

APPENDIX D

(PLEA)

COUNTY COURT,

KINGS COUNTY.

TRIAL TERM—PART IV.

THE PEOPLE OF THE STATE OF NEW YORK,

against

EUGENE FITZGERALD

and

JACK MONGIOVE,

Defendants.

(Ind. No. 1987/1952—1751-P.L.; 422-P.H.L.)

Brooklyn, New York,
December 17, 1952.

Before: HON. CARMINE J. MARASCO, County Judge.

APPEARANCES:

ALBERT V. DE MEO, Esq., Assistant District Attorney, For the People.

SOLON B. HANFT, Esq., Attorney for Eugene Fitzgerald.

EUGENE PELCYGER, Esq., Attorney for Jack Mongiove.

JOHN BRAFF,
Court Reporter.

Mr. Hanft: The defendant, Eugene Fitzgerald, offers to withdraw his plea of not guilty heretofore entered and offers to plead guilty to the crime of the attempt to violate section 1751 to cover all counts in the indictment. Attempting to violate under the second count in the indictment.

Mr. Pelcyger: On behalf of the defendant Jack Mongiove, the defendant offers to withdraw his plea of not guilty heretofore entered and offers to plead guilty to attempted violation of 422 of the Public Health Law to cover all counts.

Mr. De Meo: And that is as a felony.

The Court: Oh, yes. Let there be no misunderstanding.

Mr. De Meo: Yes, therefore I recommend the acceptance of the pleas.

Mr. Hanft: That is why I mentioned it the way I did, violation of 1751 as a felony.

The Court: Fitzgerald, you are an old patient of mine. In 1948 I committed him to the reformatory.

By the Court:

Q. Eugene Fitzgerald, is that your name? A. Yes.

Q. Jack Mongiove, is that your name? A. Yes.

Q. Your respective lawyers requested that I now permit both of you to withdraw your former pleas of not guilty and that I allow you to plead guilty to attempted violation of Section 1751 of the Penal Law as a felony, based on the second count in the indictment and the pleas to cover all counts in the indictment. Now, do you wish to plead guilty to the attempt to violate Section 1751 of the Penal Law as a felony? A. (Both defendants) Yes.

Q. In other words, if you plead guilty to the attempt you had in your possession a preparation or compound or mixture containing one per cent or more of an alkaloid of heroin, the aggregate weight of one-quarter of an ounce

or more. Is that what you plead guilty to? A. (Both defendants) Yes.

Q. Before you plead guilty, I want you to understand that I am not making any promise to you regarding the sentence you may receive in this case. Did your lawyers or the District Attorney or anyone else guarantee you any particular sentence if you plead guilty? A. (Both defendants) No.

Q. Are you pleading guilty of your own free will? A. (Both defendants) Yes.

Q. Did anybody force you to plead guilty? A. (Both defendants) No.

The Court: Take the plea.

The Clerk of the Court: Eugene Fitzgerald, do you now in the presence of your lawyer, Mr. Hanft, now withdraw your plea of not guilty heretofore entered and plead guilty to the crime of attempting to possess heroin with intent to sell same as a felony to the second count of the indictment to cover the entire indictment, the same count as defined in 1751 of the Penal Law?

Mr. Hanft: Attempt to violate section 1751.

The Clerk of the Court: Violation of Section 1751 makes it a felony and these defendants are pleading guilty to the attempt. Jack Mongiove, do you now in the presence of your attorney, Mr. Pelcyger, wish to withdraw your plea of not guilty and plead guilty to the crime of attempting to possess heroin as a felony in the second count of the indictment, to cover the entire indictment as defined in Section 1751 of the Penal Law?

Defendant Mongiove: Yes.

Mr. Pelcyger: On behalf of the defendant, a short time before this incident took place both the defendants voluntarily had themselves committed to the Riverside Hospital for treatment as users. They remained there for a period of time—for a period of a week or two. Then they re-

turned. Mr. Hanft and I spoke to the mothers of the defendants, and there is no question that these boys are users. They have tried to help themselves and they have not been successful in doing it. We then requested an application to the Court to have both of these defendants committed to the hospital and be treated.

The Court: Just a minute, counsellor. When we deal with the sanity of a defendant, we commit him to Kings County Hospital for observation. This is somewhat different. I can and will order these defendants be so confined, so that they will receive such treatment as they may need, because of their present condition, but I can't send them to the hospital.

Mr. Pelcyger: I did not mean that.

The Court: Now, the defendants are remanded.

Mr. Pelcyger: Bail revoked?

The Court: Bail revoked. However, the Court orders that both defendants receive such medical treatment or other treatment as they may be found to be in need of. The Court orders that upon their return to jail that they be immediately examined to determine what sort of treatment they need.

Mr. Pelcyger: Would your Honor order a direct transport to Kings County Hospital such as you enumerated?

The Court: I can't. We are not dealing with a mental case.

Mr. Pelcyger: For physical treatment.

The Court: I am doing that indirectly. I do not see the need—

Mr. Pelcyger: May I step up for a minute?

The Court: No, no. I know what you are getting at. We would need 50 or more hospitals just for that.

Mr. Pelcyger: They just committed themselves voluntarily to the Riverside Hospital themselves.

The Court: They need help. I will give them the help they need.

Mr. Pelcyger: Thank you very much.

The Court: They not only ruin themselves, but they ruin their families. Here is a kid, Mongiove, who was never in trouble. He is a coke fiend. Who always suffers? The parents.

Mr. Pelcyger: They are here in court today. They are really fine parents.

The Court: It is a terrible thing. If they get into the habit and they need the stuff, and they can't get it, they will kill somebody. I was also for many years a lawyer before I got up here. I handled a lot of these narcotic cases. I have more contempt for the peddler. I knew of cases where a poor victim will come around and if he does not have a whole dollar—if he had 96 cents—what do you think the peddler would give him? He would give him a harmless milk powder that costs maybe a half a cent. I know about these cases.

Mr. Pelcyger: You used to come from that area where it was peddled.

The Court: Yes, and where a man becomes a user, he needs our sympathy. Only God can help him.

Appendix E.

(TRIAL)

Tried—Part .....

Judge .....

A. D. A. .....

Verdict .....

.....

.....

.....

(PLEA)

.....

Part .....

Judge .....

A. D. A. .....

Plea is Guilty to .....

.....

Nov 26 1952

Both defendants personally appear and each advised by the Court of his rights pursuant to Section 308, C.C.P. Have you a lawyer? Each no. Have you money to retain a lawyer? Each no. Do you wish the Court to assign a lawyer? Each yes.

Name of Lawyers assigned
S. B. Hanft (F)
26 Court St.
Eugene Pelcyger (M)
26 Court St.

Both lawyers retained on 12/4/52—see inside—

Appendix E

No. 1987/1952

THE PEOPLE

vs.

B.

EUGENE FITZGERALD

B.

JACK MONGIOVE

VIOLATION OF PUBLIC HEALTH LAW WITH RESPECT TO NARCOTIC DRUGS AS A FELONY—TWO COUNTS

INDICTMENT

VIOLATION OF PUBLIC HEALTH LAW WITH RESPECT TO NARCOTIC DRUGS AS A MISDEMEANOR UNLAWFULLY HAVING UNDER CONTROL AND POSSESSING A HYPODERMIC NEEDLE

A TRUE BILL

ILLEGIBLE

Foreman

MILES F. McDONALD
District Attorney

Both Plead Not Guilty Nov 26 1952

Both bail continued

Judge NATHAN R. SOBEL

A. D. A. MOORHEAD

Filed Nov 26 1952

Appendix E

True Name Eugene Fitzgerald

Male Color White

Age 20 Nativity Brooklyn

Residence 259 Bergen St., Bklyn

Occupation Chauffeur

Mechanical Trade None

Married No

Read and Write Yes

Degree of Education 8 B P. S.

Religion Catholic

Degree of Religious Instruction Irreg.

Parents Living Mother

Temperate

Drugs Yes Heroin

Previous Conviction F. M.

Sentence ILLEGIBLE

Judge Marasco, J. 4

Date 1/15/53

Appendix E

True Name James Jack Mongiove

Male Color White

Age 20 Nativity Brooklyn

Residence 537 Clinton St., Bklyn

Occupation Longshoreman

Mechanical Trade None

Married No

Read and Write Yes

Degree of Education 4th Term H. S.

Religion Catholic

Degree of Religious Instruction Irreg.

Parents Living Both

Temperate

Drugs Yes Heroin

Previous Conviction None

Sentence ILLEGIBLE

Judge Marasco, J. 4

Date 1/15/53